


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD EUGENE BALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72740

FILED

MAY 15 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Eugene Ball appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Ball argues the district court erred in denying the claims of ineffective assistance of trial counsel raised in his September 30, 2015, petition and supplement. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's

application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Ball argued his counsel was ineffective for failing to object when the State improperly refreshed the recollection of the victim during her testimony. Ball asserts the State improperly read to the victim her prior statements and asked if she recalled the statements, and did not make a proper attempt to refresh the victim's memory with a writing. Ball failed to demonstrate resulting prejudice. During the victim's testimony, she stated she did not recall some specifics regarding the incidents at issue. In response, the State asked her if she had spoken with persons at child protective services (CPS) following the incidents and the victim stated she had. The State then read aloud statements the victim uttered to CPS and asked the victim if she recalled making the statements. The victim acknowledged she made the statements.

The record before this court demonstrates the State did not appropriately refresh the victim's recollection pursuant to NRS 50.125 and direct admission of the challenged statements constituted hearsay, *see* NRS 51.035. However, the victim and her sister incriminated Ball with the portions of their testimony that were not hearsay. Specifically, the victim stated Ball punched her in the face, injuring her lip. Moreover, additional witnesses testified regarding the victim's injuries, testified the injuries did not appear to be self-inflicted, and testified regarding photographs depicting the injuries. Our review of the record reveals significant evidence of Ball's guilt, even excluding the challenged hearsay statements. Ball failed to demonstrate a reasonable probability of a different outcome had his counsel objected to the introduction of the victim's prior statements. Therefore, we conclude the district court did not err by denying this claim.

Second, Ball argued his counsel was ineffective for failing to properly present evidence concerning an incident where the victim's grandmother hit the victim. Ball asserted his counsel only briefly presented information regarding the altercation between the victim and her grandmother, but should have performed further actions to show the victim's injuries could have been caused by her grandmother. Ball failed to demonstrate his counsel's performance was deficient or resulting prejudice. Counsel elicited testimony regarding an incident in which the victim was punched by her grandmother through the testimony of the victim's sister. Ball failed to demonstrate counsel performed in an objectively unreasonable manner with respect to this information. As the jury heard testimony regarding the altercation involving the victim's grandmother, Ball failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions with respect to this information. Therefore, we conclude the district court did not err by denying this claim.

Third, Ball argued his counsel was ineffective for failing to object during the State's rebuttal argument when it asserted the victim's mother did not want to testify at trial. Ball asserted this argument was not supported by the evidence or testimony produced at trial. Ball failed to demonstrate his counsel's performance was deficient or resulting prejudice. The record reveals the victim's sister testified her mother sided with Ball, who was married to the victim's mother. Additional witnesses testified the victim's mother did not cooperate with the authorities with this matter. Recognizing "the prosecutor may . . . assert inferences from the evidence and argue conclusions on disputed issues," *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013), Ball failed to demonstrate the State's rebuttal argument was improper. Accordingly, Ball failed to demonstrate his

counsel acted in an objectively unreasonable manner by not objecting to this rebuttal argument or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

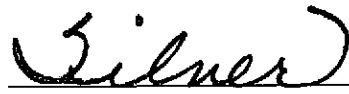
Next, Ball argued his appellate counsel provided ineffective assistance of counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


First, Ball argued his appellate counsel was ineffective for failing to argue on direct appeal that the State improperly asserted during rebuttal argument that the victim's mother did not want to testify. Ball failed to demonstrate his counsel's performance was deficient or resulting prejudice. As we previously explained, the State's argument was a reasonable inference based upon the trial testimony, and thus, Ball did not demonstrate the State's argument was improper. *See Truesdell*, 129 Nev. at 203, 304 P.3d at 402. Accordingly, Ball failed demonstrate his appellate counsel's performance regarding this issue was objectively unreasonable or a reasonable likelihood of success on appeal had counsel challenged the


rebuttal argument. Therefore, we conclude the district court did not err by denying this claim.

Second, Ball argued his appellate counsel was ineffective for failing to assert the trial court erred by refusing to instruct the jury regarding gross misdemeanor child endangerment as a lesser-included offense. Ball failed to demonstrate prejudice. The record before this court reveals the victim testified Ball punched her, injuring her lip. Given the willful nature of Ball's act, he did not demonstrate a reasonable probability of success on direct appeal had counsel argued the district court erred by declining a lesser-included-offense instruction. See NRS 200.508(1) (stating a person who willfully causes "unjustifiable physical pain or mental suffering as a result of abuse" is guilty of felony child abuse, neglect or endangerment; see *Barnier v. State*, 119 Nev. 129, 132-33, 67 P.3d 320, 322 (2003) (reviewing jury instruction issues for harmless error); see also *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining that under the *Strickland* prejudice standard, the likelihood of a different result must be substantial, not just conceivable). Therefore, we conclude the district court did not err by denying this claim.

Having concluded Ball is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk